Supreme Court, U.S.
FILED
JUN 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1817

In The

Supreme Court of the United States

October Term, 1990

COUNTY OF RIVERSIDE and COIS BYRD, SHERIFF OF RIVERSIDE COUNTY,

Petitioners,

v.

DONALD McLAUGHLIN, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

FERGUSON, PRAET & SHERMAN
PETER J. FERGUSON
333 South Anita, Suite 630
Orange, California 92668
(714) 978-9549

FIDLER & BELL
MICHAEL A. BELL
3666 University Ave., Ste. 308
Riverside, California 92502
(714) 683-6014

GREINES, MARTIN, STEIN & RICHLAND
MARTIN STEIN*
TIMOTHY T. COATES
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210
(213) 859-7811

*Counsel of Record

Attorneys for Petitioners County of Riverside and Cois Byrd, Sheriff of Riverside County

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I. THIS CASE PROPERLY RAISES THE QUESTIONS PRESENTED IN THE PETITION CONCERNING THE INCORPORATION OF PROBABLE CAUSE HEARINGS MANDATED BY *GERSTEIN v. PUGH*, 420 U.S. 103 (1975) INTO EXISTING STATE PRE-TRIAL CRIMINAL PROCEDURES. 1

A. The Ninth Circuit's November 8, 1989 Opinion Directly Addressed The Question Of Whether The County Of Riverside's Compliance With California Law Permitting Probable Cause Determinations To Be Made At The Time Of Arraignment Within Two Days Of Arrest Met The Requirements Of *Gerstein v. Pugh*. 1

B. The Ninth Circuit's Opinion Is Squarely Inconsistent With This Court's Decision In *Schall v. Martin*, 467 U.S. 253 (1984) And The Second Circuit's Opinion In *Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988). 3

C. The Ninth Circuit's November 8, 1989 Opinion Is In Conflict With The California Supreme Court's Decision In *In Re Walters*, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975). 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 9, 10

In Re Walters, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975) 6, 7

Robinson v. City of Chicago, 868 F.2d 959 (7th Cir. 1989) 9

Schall v. Martin, 467 U.S. 253 (1984) 3, 4, 6

Williams v. Ward, 845 F.2d 374 (2d Cir. 1988) 3, 4, 6

CODES

California Penal Code section 825 .....1, 2, 3, 5

California Penal Code section 991 .....1, 2, 3, 5

I.

THIS CASE PROPERLY RAISES THE QUESTIONS PRESENTED IN THE PETITION CONCERNING THE INCORPORATION OF PROBABLE CAUSE HEARINGS MANDATED BY *GERSTEIN v. PUGH*, 420 U.S. 103 (1975) INTO EXISTING STATE PRE-TRIAL CRIMINAL PROCEDURES.

A. The Ninth Circuit's November 8, 1989 Opinion Directly Addressed The Question Of Whether The County Of Riverside's Compliance With California Law Permitting Probable Cause Determinations To Be Made At The Time Of Arraignment Within Two Days Of Arrest Met The Requirements Of *Gerstein v. Pugh*.

Plaintiffs and respondents present a characterization of the proceedings before the district court and Ninth Circuit, that is patently inaccurate. Specifically, plaintiffs argue that the Ninth Circuit neither addressed nor decided, the question of whether provisions of California Penal Code sections 825 and 991 permitting probable cause determinations to be made at the time of arraignment within two days of arrest, met the constitutional "promptness" requirement for probable cause determinations under *Gerstein*. They additionally assert that the County of Riverside, in any event, does not provide a probable cause determination within the time parameters specified by California law. Yet, review of the district court order granting the preliminary injunction, the record before the Ninth Circuit, and indeed the Ninth Circuit's opinion itself, belies plaintiffs' contention.

Despite the statements contained in the respondents' opposition suggesting that the record before the district court indicated that warrantless misdemeanor arrestees were not provided probable cause determinations within two days of arrest at the time of arraignment, and that felony arrestees did not receive such a determination

until the time of preliminary hearing, some ten days after arraignment, the evidence before the district court clearly establishes that the County in fact met the California guidelines for providing probable cause determinations at the time of arraignment. In the district court the County introduced direct evidence that all warrantless arrestees, both those arrested for felonies and those arrested for misdemeanors, were advised at the time of arraignment of their right to receive a probable cause determination at that time. The only evidence plaintiffs presented with respect to probable cause determinations being delayed beyond the time of arraignment, consisted of testimony taken prior to the County of Riverside's institution of a new policy for conducting probable cause determinations – a policy that was in effect at the time of the district court's decision on the motion for preliminary injunction. The evidence before the district court was unequivocal – the County was in full compliance with California law requiring that probable cause determinations be made no later than at the time of arraignment.

Not surprisingly, both the district court and the Ninth Circuit expressly found that the County was providing probable cause determinations in compliance with the provisions of California Penal Code sections 825 and 991, although each court found that providing such determinations within that time frame did not meet the requirements of *Gerstein*. For example, in the order granting preliminary injunction, the district court noted that under the County's system of providing probable cause determinations at the time of arraignment within two court days after arrest, "the first judicial appearance of a prisoner arrested on a Thursday or Friday occurs the following week. If there is an intervening holiday and a weekend as much as five (5) days of delay after arrest occurs." (Petition, App. 11.) Similarly, the Ninth Circuit

also found that the County provided probable cause determinations within the time frame specified in California Penal Code sections 825 and 991, but nonetheless concluded this was "not in accord with *Gerstein*'s requirement of a determination 'promptly after arrest.' " (Petition, App. 7.)

Review of the Ninth Circuit's opinion leaves no doubt that the Court expressly addressed and resolved the question of whether providing probable cause determinations to warrantless arrestees pursuant to California Penal Codes section 825 and 991 met the constitutional requirements set forth in *Gerstein*. Respondents' efforts to re-characterize both the record in this case and the factual premise of the Ninth Circuit's opinion, cannot insulate the Ninth Circuit's departure from controlling precedent from scrutiny by this Court.

B. The Ninth Circuit's Opinion Is Squarely Inconsistent With This Court's Decision In *Schall v. Martin*, 467 U.S. 253 (1984) And The Second Circuit's Opinion In *Williams v. Ward*, 845 F.2d 374 (2d Cir. 1988).

In *Schall v. Martin*, 467 U.S. 253, this Court applied *Gerstein* in rejecting a due process attack on a state statute which allowed juveniles to be detained for a delinquency determination for three and sometimes as much as six days prior to receiving a probable cause determination. The Court found that under *Gerstein*, this delay was permissible, since it resulted from the incorporation of probable cause determinations into existing state pre-trial proceedings which afforded procedural protections far greater than those required by *Gerstein*, for example, an adversarial proceeding with the presence of counsel. In *Williams v. Ward*, 845 F.2d 374, the Second Circuit applied *Schall* in upholding a state procedure providing probable cause determinations at arraignment within 72 hours of

arrest. The Second Circuit expressly rejected the contention that the constitutional "promptness" of a probable cause determination was determined solely by the time needed to complete booking and processing of prisoners, observing that both *Gerstein* and *Schall*, recognized that "additional procedures require additional time [and] indicate that the constitutional 'promptness' of a probable cause hearing must be determined in light of the totality of the processes afforded the defendant." (*Id.* at 386.)

Respondents assert that the Ninth Circuit's opinion in the instant case is consistent with both *Schall* and *Williams*. They argue that both the district court and the Ninth Circuit took into account delays occasioned by providing probable cause determinations at arraignment, but nonetheless found that the County of Riverside could offer no reason for delaying arraignments more than 36 hours. Respondents' contention, however, simply does not bear scrutiny. At no time either in the district court, or on appeal, did respondents *ever* argue that the arraignment procedures utilized by the County of Riverside could be conducted in less than 48 hours of arrest; to the contrary, respondents at all times asserted that the time of arraignment was irrelevant and that what was constitutionally required was an entirely *separate* probable cause proceeding held before a neutral judicial officer. In asserting the "reasonableness" of the 36-hour time period for providing such hearings, plaintiffs focused solely on what they asserted was the time necessary to complete the administrative steps incident to arrest – completion of paperwork and the like.[1]

---

[1] As noted in the petition (and ignored by respondents), the 36-hour time period utilized by the district court and

(Continued on following page)

The Ninth Circuit's November 8, 1989 opinion similarly focuses solely on the administrative steps necessary to complete the arrest process, i.e., completion of paperwork and the like, in determining the constitutional promptness of any probable cause determination. There is no suggestion in the Ninth Circuit's opinion that it found that the County of Riverside could in fact provide warrantless arrestees with arraignment more promptly than two days after arrest; rather, the Court was careful to note that the County did not establish that it could not provide arrestees with probable cause determinations *alone*, within the 36-hour time period specified by the district court. Indeed, in modifying the injunction in this case, the Court did not order the County of Riverside to provide arraignment at an earlier time period, but rather, required probable cause determinations to be made in a separate ex parte proceeding before a neutral officer.

Pursuant to California Penal Code sections 991 and 825, the County of Riverside provides warrantless arrestees with the opportunity for a probable cause determination at the time of arraignment within two days of arrest. As in *Williams*, while the purely administrative steps incident to arrest, such as completion of booking and the like, might consume less time than two days,

---

(Continued from previous page)

upheld by the Ninth Circuit was not in fact based upon any evidentiary matter presented by plaintiffs with respect to the time needed by the County of Riverside to process prisoners following arrest, or the time necessary to provide them with arraignment. Rather, as the district court's order itself reflects, the 36-hour time period was gleaned solely from a stipulated order entered in another case before the same district court judge, involving a different public entity, *Scott v. Gates*, CV 84-8647. (See Petition, at App. 11.)

providing the additional constitutional protections available at arraignment necessarily requires expenditure of additional time. Under this Court's decision in *Schall*, and as recognized by the Second Circuit in *Williams*, the delays necessitated by providing these additional constitutional protections must be taken into account in determining whether a probable cause determination is constitutionally prompt under *Gerstein*. Neither the district court, nor the Ninth circuit allowed delays occasioned by providing greater constitutional protections at the time of arraignment to be taken into account in judging the constitutional "promptness" of probable cause determinations given in the County of Riverside. In this regard, the Ninth Circuit's decision is flatly inconsistent with this Court's opinion in *Schall*, and with the Second Circuit's opinion in *Williams*. Thus, review is amply warranted.

C. The Ninth Circuit's November 8, 1989 Opinion Is In Conflict With The California Supreme Court's Decision In *In Re Walters*, 15 Cal.3d 738, 126 Cal.Rptr. 239, 543 P.2d 607 (1975).

In *In re Walters*, the California Supreme Court accepted this Court's invitation in *Gerstein* to incorporate probable cause determinations into existing pre-trial proceedings. The California Supreme Court found that *Gerstein*'s requirements would be met if probable cause determination were made at the time of arraignment, i.e., within two days of arrest. *In re Walters* was later codified in Penal Code section 991. The Ninth Circuit's opinion in this case omits any reference to *In re Walters*, even though its decision directly conflicts with the California Supreme Court's conclusion that a probable cause determination conducted as of the time of arraignment within two days of arrest meets the requirements set forth in *Gerstein*.

Respondents assert that *In re Walters* is irrelevant to the constitutional question presented in the instant case. They argue that *In re Walters* does not address the issue of "promptness" of probable cause determinations under California law. Nonsense. As even a cursory review of *In re Walters* reveals, the issue directly before the California Supreme Court was precisely how the probable cause requirement set forth in *Gerstein* could be incorporated into existing California pre-trial procedures. The court explicitly found that *Gerstein*'s requirement of a prompt probable cause determination for warrantless arrestees would be met by providing such determinations at the time of arraignment, which under California law was then required to take place within two days of arrest.

Respondents additionally argue that *In re Walters* applies only to individuals arrested for misdemeanors. This ignores two points. First, even if limited to misdemeanors, *In re Walters* (and its statutory counterpart, Penal Code section 991), still sets statewide standards for providing a significant number of warrantless arrestees with probable cause determinations. Second, since the only issue presented to the California Supreme Court in *In re Walters* concerned application of *Gerstein* to misdemeanors, the Court had no occasion to address its application to felony arrestees. However, there is no reason to believe that the California Supreme Court's reasoning would differ with respect to applying *Gerstein* to felony arrestees. Indeed, based upon the California Supreme Court's decision in *In re Walters*, numerous public entities, including the County of Riverside, currently provide both misdemeanor and felony warrantless arrestees with the opportunity for a probable cause determination at the time of arraignment.

In *In re Walters*, the California Supreme Court accepted this Court's invitation in *Gerstein* to incorporate

probable cause determinations into existing pre-trial proceedings. The Court expressly found that *Gerstein*'s requirements would be amply satisfied by permitting probable cause determination to be made at the time of arraignment, within two days of arrest. That is precisely the time frame followed by the County of Riverside in the instant case, and found constitutionally deficient by the Ninth Circuit. The Ninth Circuit's opinion in this case is in direct conflict with the opinion of the California Supreme Court concerning the constitutionally "prompt" outside time period in which warrantless arrestees may be provided with probable cause determinations. Thus for this reason too, review is warranted.

II.

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS CONCERNING ARTICLE III STANDING REQUIREMENTS.

In its November 8, 1989 opinion, the Ninth Circuit concluded that the mere fact that the named plaintiffs in this action continued to suffer injuries as the result of the their failure to receive a prompt probable cause determination, i.e., that they remained in custody, necessarily provided them standing to seek injunctive relief. Respondents echo this position in their opposition, and further assert that this Court's decision in *Gerstein* supports their position. The contention is meritless.

First, the passage from *Gerstein* cited by respondents does not discuss the issue of *standing* with respect to the ability of pre-trial detainees to obtain injunctive relief; rather it solely addresses the question of whether a properly certified class action in which the named plaintiffs *had standing at the outset* will be rendered moot by the fact

that the named plaintiffs are not in custody at the time of certification. (See 420 U.S. at p. 110 fn.11.) Second, *Gerstein* was decided almost a decade before *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and did not purport to address, much less resolve, any question with respect to the individually named plaintiffs' standing to bring the action for equitable relief.

Respondents' attempt to distinguish the Seventh Circuit's decision in *Robinson v. City of Chicago*, 868 F.2d 959 (7th Cir. 1989) is similarly unavailing. Respondents assert that in *Robinson*, the standing question was resolved based solely on the fact that the named plaintiffs were not in custody at the time the complaint was filed. Yet, review of *Robinson* belies this argument. In finding the named plaintiffs lacked standing, the *Robinson* court observed that *by its very nature* governmental conduct with respect to pre-trial detention is necessarily "limited temporally" and thus provides "no significant possibility that a putative plaintiff *would have enough time while detained* to file suit" in order to obtain standing for purposes of seeking injunctive relief. (See 868 F.2d at 968; emphasis added.) As this passage indicates, the *Robinson* court was not concerned that an individual would not be *in custody* long enough to file suit, but that even as the arrestee was in custody, the time in which to remedy the alleged violation through injunctive relief by providing a "prompt" probable cause hearing, would have already passed. This is, of course, precisely the situation in the instant case. The named plaintiffs alleged they were in custody and had not received constitutionally prompt probable cause determinations; yet, under their theory of the case, even if the injunction was issued on the date the complaint was filed, the County could not have redressed their particular injuries, since the time in which to

provide *them* with a "prompt" probable cause hearing had, according to their allegations, already passed.

As this Court held in *Lyons*, the mere fact that a plaintiff continues to suffer injury by reason of a defendant's conduct does not create standing to assert a claim for injunctive relief under Article III. Under such circumstances a plaintiff may have a damage remedy; however, to assert a claim of injunctive relief a plaintiff must demonstrate that he or she will again be subject to the unconstitutional conduct sought to be enjoined. Here, none of the plaintiffs alleged that they would again be arrested and held without receiving a constitutionally prompt probable cause determination. Thus, under *Lyons*, the named plaintiffs clearly lacked standing to prosecute the instant action. By declining to apply the clear holding of *Lyons* to the instant case, the Ninth Circuit has effectively invited an entirely new class of lawsuits to be filed in the federal courts – lawsuits that this Court expressly found in *Lyons* to be foreclosed by Article III standing requirements. For this reason too, review should be granted.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

FERGUSON, PRAET & SHERMAN
Peter J. Ferguson

Fidler & Bell
Michael A. Bell

Greines, Martin, Stein & Richland
Martin Stein
Timothy T. Coates

Counsel for Petitioners County of Riverside and Cois Byrd, Sheriff of Riverside County